

Docket No: 13-0553
Bench Session: 02/20/14
Deadline: N/A

MEMORANDUM

TO: The Commission

FROM: Glennon P. Dolan and D. Ethan Kimbrel, Administrative Law Judges

DATE: February 18, 2014

SUBJECT: Commonwealth Edison Company
Investigation of tariffs approved in Docket No. 13-0386
The People of the State of Illinois' Motion for Partial Collection of Revenues Subject to Refund.

RECOMMENDATION: Deny the AG's Motion.

Introduction

On November 26, 2013, the Commission entered an Order ("2013 Investigation Order") that rejected a recommendation of the People of the State of Illinois (the "AG") regarding a component of the reconciliation calculation of Commonwealth Edison Company's ("ComEd" or the "Company") formula rate tariff related to the recognition of accumulated deferred income taxes ("ADIT") in the calculation of the reconciliation under- or over-recovery. In its Application for Rehearing filed on December 26, 2013, the AG requested that the Commission reconsider its rejection of its proposed adjustment. On January 14, 2014, the Commission denied the AG's Application for Rehearing on this issue as well as all others including those of the Citizens Utility Board ("CUB") and ComEd. The next day ComEd filed its Notice of Appeal and Petition for Review with the Appellate Court of Illinois, First Judicial District. The AG filed a Motion for Partial Collection of Revenues Subject to Refund (the "Motion") in both this docket and Docket No. 13-0318 on January 17, 2014.

In its Motion, the AG requests that the Commission enter an order that provides that the additional revenues ComEd receives pursuant to the Commission's rejection of the AG-proposed ADIT adjustment in the calculation of the reconciliation under-recovery be collected subject to refund pending the outcome of the AG's appeal. The AG states that an order from the Commission is necessary to preserve the status quo during the appellate review of the Commission's Orders and would prevent irreparable harm to ComEd customers who would be required to pay millions more in electric delivery

charges associated with the Commission's failure to reflect ADIT in the calculation of the reconciliation under-recovery, with no opportunity to be made whole.

On January 30, 2014, the AG filed a Notice of Appeal seeking reversal in part of the Commission's November 26, 2013 Order implementing the formula rate tariff changes, as well as the January 14, 2014 Order denying the requested rehearing.

ComEd filed its Response to the AG Motion on January 31, 2014. On February 7, 2014, the AG filed its Reply. Also on February 7, 2014, ComEd filed a Notice of Supplemental Authority which the AG addressed in its Reply.

The AG's Position

The AG explains that when determining whether to grant a stay or collection subject to refund, the Commission has been guided by the same factors traditionally used by courts when evaluating whether such requested relief is appropriate: (1) the irreparable harm petitioners will suffer if the stay (or collection subject to refund) is denied; (2) the harm to other parties that would result from the issuance of a stay (or collection subject to refund); and (3) the petitioner's likelihood of prevailing on the merits. Commonwealth Edison Company, Ill. C.C. Docket No. 87-0427; 87-0169; 88-0189; 88-0219; 88-0253 On Remand; 90-0169 Consol., 1993 Ill. PUC LEXIS 21 (Order, January 8, 1993). See also City of Chicago v. Illinois Commerce Comm'n, 133 Ill.App.3d 435 (1st Dist. 1985).

The People Will Be Irreparably Harmed If The Commission Does Not Order A Partial Collection of Revenues Subject to Refund.

Section 16-108.5(d) of the Public Utilities Act ("PUA" or the "Act") provides that "[t]he Commission shall not, however, have the authority in a proceeding under this subsection (d) to consider or order any changes to the structure or protocols of the performance-based formula rate approved pursuant to subsection (c) of this Section." 220 ILCS 5/16-108.5(d). The AG maintains to the extent that the Commission's November 26, 2013 decision establishes formula rate tariff components, the decision not to reflect ADIT in the reconciliation provisions of the tariff will impact future annual formula rate determinations until the Court issues its decision in the AG's appeal. The AG reasons that given that 1) refunds are precluded during the pendency of an appeal, unless a stay or collect-subject-to-refund order is granted by the Commission or Court, and 2) the Company's next subsequent formula rate tariff filings will include no deduction for ADIT from the reconciliation under- or over-recovery as a result of the Commission's November 26, 2013 ruling, a stay or collect-subject-to-refund order is necessary to preserve the status quo and ensure that ratepayers are not irreparably harmed by the collection of excessive rates prior to the date of an appellate court ruling.

ComEd Will Not Be Harmed By Ordering a Partial Collection of Revenues Subject to Refund.

The AG states that ordering ComEd to collect the additional revenues it receives pursuant to the Commission's rejection of the AG-proposed ADIT adjustment in the calculation of the reconciliation under-recovery does not threaten irreparable harm to ComEd's financial condition. The AG offers that ComEd is guaranteed recovery of its prudent and reasonable costs, along with a generous statutorily-set return on equity, under Section 16-108.5 of the Act. 220 ILCS 5/16-108.5(c), (d). The AG submits that collection of the above-identified revenues subject to refund will not change that outcome or the revenue requirement approved in the Commission's November 26, 2013 Order in this docket or in the Commission's December 18, 2013 formula rate order in ICC Docket No. 13-0318.

The AG finds that granting its request to collect a portion of ComEd's revenues subject to refund would be consistent with similar, recent decisions of the Commission to stay an order or collect revenues subject to refund. For example, the Commission stayed its February 23, 2012 Order on Remand in Docket No. 07-0566, which authorized a refund to ComEd customers of \$36.7 million, thereby delaying the return of unlawfully collected funds dating back from September 30, 2010, until the resolution of ComEd's appeal before the Second District Appellate Court. The AG notes that the Commission granted this stay despite the fact that (1) as a result of the stay, ratepayers' would be forced to wait another two years (as it turned out) to receive a \$36.7 million refund of ComEd's unlawful collection of revenues dating back to September 30, 2010, and (2) ComEd never filed a motion to stay the Commission's Order on Remand. In addition, the Commission granted the AG's request for collection of Rider VBA revenues subject to refund in Docket 11-0280, 11-0281 (cons.).

The AG Is Likely to Prevail On the Merits In An Appeal.

Finally, the AG argues that it has a reasonable likelihood of prevailing on the merits in an appeal of the Commission's November 26, 2013 formula rate tariff order based on the recently issued Fourth District Appellate Court ruling in Ameren Illinois Company v. Illinois Commerce Comm'n, 2013 IL App (4th) 121008 (Dec. 11, 2013) (the "Fourth District Opinion", "Ameren Decision" or "Ameren Opinion"). The AG claims that opinion presents new controlling law that specifically authorizes the Commission to interpret the relevant portions of the PUA – including the recent modifications to Section 16-108.5 triggered by Public Act 98-0015 ("PA 98-0015") -- to deduct deferred tax from the reconciliation balance prior to calculating interest on that balance, consistent with established regulatory principles. According to the AG, the Commission clearly based its reasoning in both the Final Order and, presumably in its denial of the AG's Application for Rehearing, on its interpretation of the formula rate statute and the amendments of P.A. 98-0015, concluding that because the statute did not specifically reference or require an ADIT adjustment in the calculation of the reconciliation over- or under-recovery, the Commission could not entertain such a proposal. The AG reasons that the new guidance provided by the Fourth District Opinion should have provided the Commission with assurance that it has the discretion and authority to implement this adjustment, despite the lack of express statutory authorization in Section 16-108.5(d)(1)

of the PUA, and that to not reflect the ADIT in the reconciliation would create a windfall for the Company, as the Fourth District Court found.

ComEd's Position

ComEd argues that the Commission should deny the AG's motion for three reasons. First, ComEd has already filed a notice of appeal and a petition for review of the Commission's 2013 Investigation Order, and that appeal has divested the Commission of any continuing jurisdiction to order the relief requested by the AG. Second, even if the Commission were to retain subject matter jurisdiction despite the pending appeal, the Commission still would be without the power to order the requested relief because such relief is prohibited by the rule against retroactive ratemaking. Last, the AG's motion should be denied because, on the merits, the Commission correctly decided the issue underlying the AG's motion three times – once in approving the applicable portion of the formula rate in ICC Docket No. 13-0386, once in its final Order in the instant docket, and again in denying the AG's application for rehearing in the instant docket. ComEd adds that the Commission, in denying rehearing, was fully aware of the Fourth District Opinion and correctly concluded that that decision did not warrant revisiting the ADIT issue presented in this docket.

Because ComEd Has Filed a Notice of Appeal of the 2013 Investigation Order, the Commission Lacks Jurisdiction Over the AG's Motion.

ComEd submits that the AG's motion should be denied because ComEd's January 15, 2014, notice of appeal and petition for review of the 2013 Investigation Order divested the Commission of jurisdiction to grant the relief requested. ComEd states that "[w]hen the notice of appeal is filed, the appellate court's jurisdiction attaches instantaneously, and the cause is beyond the jurisdiction" of the tribunal below. Daley v. Laurie, 106 Ill. 2d 33, 37 (1985). ComEd details that the statute governing appeals of Commission decisions also clearly provides that once a party files a notice of appeal, the Appellate Court "shall have and retain such jurisdiction of such appeal ... until such appeal is disposed of in such appellate court." 220 ILCS 5/10-201(a). ComEd contends that regardless of whether the Commission could have granted the AG's request if it had been made prior to the Appellate Court's assumption of jurisdiction, the AG's motion was not filed until after the Appellate Court assumed jurisdiction.

ComEd continues that although a tribunal such as the Commission retains jurisdiction to stay its own ruling even after a notice of appeal has been filed, see GMC v. Pappas, 242 Ill. 2d 163, 173 (2011) (citing Steinbrecher v. Steinbrecher, 197 Ill. 2d 514, 528 (2001)), the AG disclaims any notion that it is seeking a stay. The request should thus be denied because the notice of appeal divested the Commission of jurisdiction to make such substantive changes to the 2013 Investigation Order.

The Rule Against Retroactive Ratemaking Prohibits the Commission from Ordering that Revenues “Be Collected Subject to Refund.”

ComEd contends that the AG’s motion must also be denied because the relief it requests would violate the well-established rule against retroactive ratemaking. Unless the General Assembly has expressly legislated to the contrary, once the Commission sets a base rate, the PUA prohibits a refund or surcharge, even if the rate is ultimately invalidated on appeal. See Business & Prof’l People for the Pub. Interest v. Ill. Commerce Comm’n, 136 Ill.2d 192, 209 (1989). ComEd adds that while the Energy Infrastructure Modernization Act (“EIMA”) authorizes the retroactive adjustment of a revenue requirement through the reconciliation process, it expressly forbids the refund sought by the AG. Even if the Appellate Court were to remand the Order in this docket with directions to the Commission to order a change in the formula, EIMA provides that any such change should be applied prospectively only: “Any change ordered by the Commission shall be made at the same time new rates take effect following the Commission’s next order pursuant to subsection (d) of this Section” – that is, the change shall be made in the following annual update proceeding. 220 ILCS 5/16-108.5(d).

ComEd notes as well that the AG’s request does not fall within the one non-statutory exception to the rule against retroactive ratemaking. A court may order a refund of excess amounts collected during the interim period after the court invalidates the rates but before the Commission approves new rates. See Independent Voters of Illinois v. Illinois Commerce Comm’n, 117 Ill.2d 90, 105 (1987); People ex rel. Hartigan v. Ill. Commerce Comm’n, 148 Ill.2d 348, 396 (1992). Here, however, the AG is requesting the unprecedented relief of a refund of excess funds collected during the appellate process – that is, before the Appellate Court has ruled. ComEd submits that the Second District recently summarized the law: “[W]hen a reviewing court reverses a rate order, the Act prohibits a retrospective refund dating back to the rate order’s effective date; but the reviewing court’s equitable powers authorize a prospective refund from the date of reversal to the effective date of a new rate schedule.” Commonwealth Edison Co. v. Ill. Commerce Comm’n, 2013 IL App (2d) 120334 ¶ 49 (2d Dist. Sept. 27, 2013).

Finally, ComEd asserts that the AG cites no case in which the Commission has held that it may award a refund of excess funds collected during the time period before the Appellate Court rules and instead relies on Commission decisions in Docket Nos. 11-0280, 11-0281, and 07-0566 which are inapposite. ComEd notes that the AG cites the Commission’s orders in Dockets Nos. 11-0280, 11-0281 (cons.), but that proceeding involved a rider, not base rates. ComEd argues that a rider by its nature “alters an otherwise applicable rate,” thereby, for example, “allowing the utility to recover the cost as it is incurred, alleviating the delay of waiting until the utility files a general rate case to recover expenses.” Citizens Utility Bd. v. Ill. Commerce Comm’n, 166 Ill.2d 111, 133 (1995). ComEd presents that the rider at issue in that case was a rate design rider, one that does not involve the retroactive correction of a rate to cure a mistake, as the

Appellate Court emphasized. See People ex rel. Lisa Madigan v. Illinois Commerce Comm'n, 2013 IL App (2d) 120243, ¶ 24 (Mar. 29, 2013).

ComEd submits that the AG also relies heavily on the Commission's Order on Remand in Docket No. 07-0566, but there the Commission ordered a refund for the period after the Appellate Court's ruling invalidating rates. See Commonwealth Edison Co. v. Ill. Commerce Comm'n, 2013 IL App (2d) 120334 ¶ 33 (2d Dist. Sept. 27, 2013). The Commission then stayed that refund order pending appeal.

The AG Offers No New Grounds for Challenging the Commission's Conclusion Regarding the Merits of the ADIT Issue.

ComEd argues that the Commission has rejected the AG's arguments on ADIT relating to the reconciliation adjustment on three occasions – first in its final Order in Docket No. 11-0721, then in the Commission's 2013 Investigation Order, and third, in its January 14, 2014 Order in that same docket denying the AG's application for rehearing. The AG's claim that the Commission's reasoning on the ADIT issue has been called into question by the Fourth District Opinion was raised in its application for rehearing which the Commission denied. ComEd reasons that the Fourth District Opinion, in any event, does not undermine the Commission's November 26, 2013 Order.

ComEd explains that the Fourth District Opinion dealt with a rate base calculation under 220 ILCS 5/16-108.5(c)(6) and that the Commission's ruling on ADIT upheld in the Fourth District Opinion had for years already been reflected in ComEd's rates and rate formula. See Commonwealth Edison Co., ICC Docket No. 11 0721 (Order May 29, 2012) at 59-60; Commonwealth Edison Co., ICC Docket No. 13-0318 (Order Dec. 18, 2013) at 2-3, 8; Commonwealth Edison Co., ICC Docket No. 12 0321 (Order Dec. 19, 2012) at 5. The Ameren Decision drew on what the court perceived to be established Commission practice in reasoning that "it is common practice to make ADIT adjustments to a rate base, and the Commission has the authority under the Modernization Act to rely on its common practices in determining a just and reasonable rate. [citing 220 ILCS 5/16-108.5(c)(6)] The Commission notes Ameren used ADIT for years in calculating its rate base and points out that only now under the Modernization Act does Ameren seek to exclude this adjustment." Ameren, 2013 IL App (4th) 121008, ¶ 38.

ComEd states that in contrast to the Ameren Opinion, the ADIT issue addressed in the 2013 Investigation Order involves a reconciliation balance under 220 ILCS 5/16-108.5(d), not the calculation of rate base under 220 ILCS 5/16-108.5(c)(6). ComEd argues that there is no established Commission practice concerning the calculation of a reconciliation balance, let alone the role of ADIT in that calculation. According to ComEd, the reconciliation balance, and the method of its calculation, is entirely the creature of statute, and the General Assembly prescribed exactly how that calculation should be performed. See 220 ILCS 5/16-108.5(d). Thus, the Commission was correct when it twice denied the AG's request to include ADIT in the reconciliation calculation.

ComEd responds that even if the statute gave the Commission discretion to calculate the reconciliation balance in whatever manner it deemed fit, it would not be logical to net the reconciliation balance against ADIT. The reason the Commission has traditionally accounted for ADIT in the calculation of rate base is that, as the Ameren Decision explains, “[o]mitting ADIT from the rate base calculation would allow Ameren what amounts to an interest-free loan at the ratepayers’ expense that would artificially increase Ameren’s rates until the next reconciliation process.” Ameren at ¶ 39. ComEd notes by contrast, omitting ADIT from the reconciliation calculation does not have that effect.

Finally, ComEd filed a Notice of Supplemental Authority on February 7, 2014 with the Commission to state that the Illinois Appellate Court, Fourth District has modified its opinion in the Ameren Decision to remove a paragraph relied upon by the AG in its Motion. ComEd notes that paragraph 14 of the AG’s Motion relied upon a portion of the Ameren Opinion stating, “[a]lthough the Modernization Act does not expressly provide for the Commission to reduce the rate base by ADIT, the ratemaking process under the Modernization Act is ultimately subject to the Commission’s discretion and authority to determine whether those rates are just and reasonable in accordance with the Commission’s practice and law.” Ameren at ¶ 39 (quoted, with alterations, in AG Motion, ¶ 14). The modified Ameren opinion omits that passage. See Ameren (as modified upon denial of reh’g, Jan. 28, 2014). According to ComEd the Court’s modification of its opinion to remove that language underscores that the Ameren decision should be interpreted to resolve solely the specific issue presented in that case – the adjustment of rate base for plant-related ADIT – and not any broader principle. ComEd concludes that its rates and rate formula already reflect the holding in the Ameren Opinion.

Analysis and Recommendation

The AG’s Motion requests that the Commission enter an order that provides that the additional revenues ComEd receives pursuant to the Commission’s rejection of the AG-proposed ADIT adjustment in the calculation of the reconciliation under-recovery be collected subject to refund pending the outcome of the AG’s appeal. The AG acknowledges that it is not seeking a motion to stay in light of Illinois Supreme Court Rule 335(g) which provides that an application for a stay of an order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency. In its Reply, the AG states that a motion to stay was not an option in this docket inasmuch as it is a tariff complaint investigation. Nevertheless, the AG maintains that its motion, similar to a motion to stay, operates to maintain the status quo and prevent irreparable harm.

The AG points to Docket Nos. 11-0280/0281, where it filed a Motion to Stay the Commission’s Order of January 10, 2012 or, in the Alternative, Motion for Collection of Rates Subject to Refund on January 20, 2012 for guidance. Here, however, the AG filed its motion prior to the parties filing Petitions for Rehearing and Notices of Appeal. It should be noted as well that although the standard to be employed in determining

whether a stay is appropriate is well founded, the Administrative Law Judges (“ALJs”) found in their February 23, 2012 Memo to the Commission filed on March 21, 2012, that there was no standard to be met for the Commission to order that money collected be refundable if the basis for collection is later found to be illegal. They also found that the language upon which the AG relies in Section 5/10-113 of the Act can be read to imply that the Commission has the latitude to order that money collected be refundable pursuant to future court order or to fashion other equitable relief in the context of a petition for rehearing.

In the instant docket, ComEd filed its Notice of Appeal on January 15, 2014 and then two days later on January 17, 2014, the AG filed its Motion. The Commission would retain jurisdiction to stay its own ruling even after a notice of appeal has been filed, however, when a notice of appeal is filed, the appellate court’s jurisdiction attaches instantaneously, and the cause is beyond the jurisdiction of the tribunal below. GMC, 242 Ill. 2d at 173; Daley, 106 Ill. 2d at 37. The Appellate Court shall have and retain jurisdiction of such appeal until it is disposed of in such appellate court. 220 ILCS 5/10-201(a). Regardless of whether the Commission could have granted the AG’s request if it had been made prior to the Appellate Court’s assumption of jurisdiction, the AG’s motion was not filed until after the the Commission had ruled upon the parties’ petitions for rehearing and ComEd had filed its notice of appeal.

Accordingly, we recommend that you deny the AG’s Motion.

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